

Before the High Court

‘Mutual Trust and Confidence’ on Trial: At Last

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Abstract

Since the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA (in liq)*, Australian courts have been grappling with claims from employees that an employer has breached a duty not to destroy ‘mutual trust and confidence’ in the employment relationship. Rarely have any of these claims sounded in a remedy of damages for the aggrieved employee, so despite the considerable number of cases raising the issue, it has never been resolved by the Australian High Court that this duty exists in Australian law. The Commonwealth Bank’s appeal in *Commonwealth Bank of Australia v Barker* provides such an opportunity. The case may also be expected to illuminate circumstances when a new term can be implied by law, as a matter of necessity, and how principles of contract construction apply in the context of Australian employment contracts.

I Introduction

The appeal in *Commonwealth Bank of Australia v Barker*¹ provides the High Court of Australia with an opportunity to settle one of the most contentious questions in Australian employment law: does Australian employment contract law recognise (as English law does) an employer’s obligation ‘not, without reasonable and proper cause, [to] conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’?² And if it does, what is the basis of that obligation? Is it a term implied

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¹ *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 (‘*Barker Appeal*’). For the transcript of the Special Leave application to the High Court of Australia, see Transcript of Proceedings, *Commonwealth Bank of Australia v Barker* [2013] HCATrans 325 (13 December 2013).

² This is the form of words used to describe the obligation in the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, 49 (‘*Malik*’). For commentary on the English law, see Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 154–70; Douglas Brodie, ‘The Heart of the Matter: Mutual Trust and Confidence’ (1996) 25 *Industrial Law Journal* 121; Douglas Brodie, ‘Beyond Exchange: the New Contract of Employment’ (1998) 27 *Industrial Law Journal* 79; Douglas Brodie, ‘A Fair Deal at Work’ (1999) 19 *Oxford Journal of Legal Studies* 83; Douglas Brodie, ‘Mutual Trust and the Values of the Employment Contract’ (2001) 30 *Industrial Law Journal* 84; Douglas Brodie, *The Employment Contract: Legal Principles, Drafting and Interpretation* (Oxford University Press, 2005) 78–9; Douglas Brodie, ‘Mutual Trust and Confidence: Catalysts, Constraints and Commonality’ (2008) 37 *Industrial Law Journal* 329; Justice Lindsay, ‘The Implied Term of Trust and Confidence’ (2001) 30 *Industrial Law Journal* 1; Mark Freedland, ‘Constructing Fairness in Employment Contracts’ (2007) 36 *Industrial Law Journal* 136; David Cabrelli, ‘The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle’ (2005) 34 *Industrial Law*

by law into all employment contracts, because the ‘nature of the contract itself implicitly requires’ it, as a matter of ‘necessity’?³ Is it rather a term to be implied in fact in specific contracts, and only when the elements of the *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*⁴ test have been satisfied, one of those elements being that the term must be ‘necessary to give business efficacy to the contract’?⁵ Or is the term better dealt with as a general principle of construction of employment contracts?⁶

The Commonwealth Bank is appealing from a decision of the Full Court of the Federal Court of Australia in which the Court was sharply divided on these questions. The majority, Jacobson and Lander JJ, accepted that ‘the implied term has obtained a sufficient degree of recognition both in England and Australia, that it ought to be accepted by an intermediate court of appeal’, and went on to find in favour of the respondent employee, Mr Stephen John Barker.⁷ Justice Jessup, however, found in favour of the Bank on the basis that there is not, nor should there be, any recognition of an implied term of trust and confidence in Australian employment contract law.⁸ In short, Jessup J held that the English law was based on shaky authority;⁹ the supposed duty of trust and confidence cannot be justified as a ‘principled development of the implied duty of co-operation’;¹⁰ it fails the test of ‘necessity’;¹¹ and its introduction into Australian law would ‘compromise the democratically-drawn architecture’¹² of a range of more recent statutory interventions into Australian employment law.

In the middle of this important debate is Mr Barker, who lost his job with the Commonwealth Bank after some 27 years’ service in various positions. Despite

Journal 284. For Australian scholarship on this development, see Adrian Brooks, ‘The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence’ (2001) 20 *University of Tasmania Law Review* 26; Joellen Riley, ‘Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16 *Australian Journal of Labour Law* 28; Kelly Godfrey, ‘Contracts of Employment: the Renaissance of the Implied Term of Trust and Confidence’ (2003) 77 *Australian Law Journal* 764; Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 73–6; Phillipa Weeks, ‘Employment Law — a Test of Coherence Between Statute and Common Law’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 166–96; Andrew Stewart, ‘Good Faith and Fair Dealing at Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 579, 583–4; Joellen Riley, ‘The Boundaries of Mutual Trust and Good Faith’ (2009) 22 *Australian Journal of Labour Law* 73; Andrew Stewart, ‘Good Faith: A Necessary Element in Australian Employment Law?’ (2011) 32 *Comparative Labor Law & Policy Journal* 521, 543–4; Joellen Riley, ‘Siblings but not Twins: Making Sense of ‘Mutual Trust’ and ‘Good Faith’ in Employment Contracts’ (2012) 36 *Melbourne University Law Review* 521, 525–30.

³ See *Liverpool City Council v Irwin* [1977] AC 239, 254 (Lord Wilberforce). See also *University of Western Australia v Gray* (2009) 179 FCR 346, 376 [139].

⁴ (1977) 180 CLR 266, 282–3.

⁵ *Ibid.*

⁶ For the construction argument, see John Carter and Elisabeth Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 *Journal of Contract Law* 1.

⁷ *Barker Appeal* (2013) 214 FCR 450, 456 [13].

⁸ *Ibid* 531 [340].

⁹ *Ibid* 490 [226], 531 [340(a)].

¹⁰ *Ibid* 531 [340(d)].

¹¹ *Ibid* 511–15 [284]–[295].

¹² *Ibid* 531 [340(g)].

a long and convoluted story about his falling out with others at the Bank,¹³ the facts ultimately settled as legally relevant at first instance were straightforward, and concerned whether his contract with the Bank included an entitlement to be considered for redeployment opportunities before dismissal for reasons of redundancy. So, in determining this dispute, the High Court of Australia will also be deciding whether Mr Barker, who was dismissed in April 2009, should be entitled to keep the \$317 500 awarded to him in September 2012 for breach of his employment contract with the Bank.

II Facts and Findings at First Instance

Mr Barker was born in 1964 and joined the Commonwealth Bank directly upon completing his schooling in 1981. For more than 20 years he worked his way up through the ranks, and in 2004 he was promoted to an executive manager position. His employment with the Bank came to an end in April 2009, and in 2010 he brought his suit against the Bank for breach of his employment contract. His initial catalogue of complaints included a claim that the Bank's decision to make his position redundant was influenced by some unpleasant office politics, and this constituted breach of the Bank's duty not to destroy mutual trust and confidence in the employment relationship,¹⁴ but this claim was rejected at first instance,¹⁵ and so did not feature in the Bank's appeal from Besanko J's decision. (A claim based on breach of the prohibition against misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth)¹⁶ also failed and formed no part of the appeal.)

Mr Barker won his case at first instance on the basis that the Bank had breached his employment contract by failing to afford him the benefit of its redeployment policy after his management position had been made redundant. The redeployment policy was included in the Bank's Human Resources ('HR') Reference Manual. The Manual included a statement asserting: 'The Manual is not in any way incorporated as part of any industrial award or agreement entered into by the Bank, nor does it form any part of an employee's contract of employment.'¹⁷ The redeployment policy included a set of procedures that enabled employees to receive information about and opportunities to apply for other positions within the Bank, if their own positions were made redundant. Mr Barker was not afforded these opportunities because one of the managers who informed Mr Barker that his position was redundant had required him to clear his desk, surrender his mobile phone and leave the office at the end of that day.¹⁸ This meant that he was not able to receive the notifications sent to his office email account and his work phone about other vacancies when they arose. Whoever was responsible for forwarding him information on other positions ignored bounce-backs from email messages, and made no attempt to forward the information to his home address. He missed out on the necessary information about redeployment

¹³ See *Barker v Commonwealth Bank of Australia* (2012) 229 IR 249 (Besanko J) ('Barker').

¹⁴ Ibid 303–4 [334]–[339].

¹⁵ Ibid 304 [341]–[342].

¹⁶ This Act has subsequently been renamed as the *Competition and Consumer Act 2010* (Cth).

¹⁷ *Barker* (2012) 229 IR 249, 293 [283].

¹⁸ Ibid 282 [208].

opportunities, simply because Bank staff had confiscated the tools he needed to receive communication from the Bank.¹⁹ Failure to follow the proper communication procedures was held to constitute a serious breach of the redeployment policy.

The HR Reference Manual and hence the relevant redeployment policy were held not to be incorporated into Mr Barker's employment contract, because they were not referred to in his written employment contract, and the Manual itself forswore any contractual effect.²⁰ Justice Besanko also held that the policy was not an implied term of his employment contract, because it failed the 'business efficacy test' as explained by Tobias J in *Willis v Health Communications Network Ltd.*²¹ His employment contract operated reasonably and effectively without it. The express statement in the Manual also effectively defeated arguments that the policy should be implied at law, or by a course of dealing.²²

Nevertheless, Besanko J held that the Bank had breached Mr Barker's employment contract because its serious breach of its own HR policy constituted conduct that was likely to destroy mutual trust and confidence in the employment relationship, and this breached the implied term of mutual trust and confidence in contracts of employment in Australia.²³ Justice Besanko traversed authority in a number of Australian cases to reach the conclusion that this implied term should be recognised in Australian law. This case law included *Koehler v Cerebos (Aust) Ltd.*,²⁴ in which the High Court assumed the existence of the obligation of mutual trust,²⁵ although his Honour acknowledged that Australian acceptance of this implied term was 'not as clear' as in English law.²⁶

Ultimately, Besanko J's decision in *Barker* was entirely consistent with the decision of Allsop J in *Thomson v Orica Australia Pty Ltd.*²⁷ In that case, a plaintiff employee succeeded in establishing breach of an employment contract on the basis that the employer had flouted its own human resources policy. In *Thomson v Orica*, Allsop J held that it was not necessary to prove that the policy was incorporated into the employment contract. It was sufficient to demonstrate that a serious breach of the policy signaled a breach of the employer's obligation not, without reasonable cause, to act in a manner calculated or likely to destroy trust and confidence in the employment relationship.²⁸ In *Thomson v Orica*, this finding was uncomplicated by the existence of any express statement in the policy document that it had no contractual effect. In *Thomson v Orica*, breach of the implied term was held to justify the plaintiff employee in treating herself as constructively dismissed from her employment. The matter subsequently settled

¹⁹ Ibid 306 [351].

²⁰ Ibid 300 [316].

²¹ (2007) 167 IR 425, 435 [33]. See *Barker* (2012) 229 IR 249, 300 [319].

²² *Barker* (2012) 229 IR 249, 300 [320].

²³ Ibid 302 [330].

²⁴ (2005) 222 CLR 44, 54–5 [24].

²⁵ *Barker* (2012) 229 IR 249, 301–2 [324]–[328].

²⁶ Ibid 302 [324].

²⁷ (2002) 116 IR 186, 223–4 [140]–[143] ('*Thomson v Orica*').

²⁸ Ibid.

without any need for the court to determine a damages award for wrongful dismissal.

In *Barker*, however, Besanko J did determine a damages award for breach of the implied term of mutual trust and confidence during employment, and this is the especially novel aspect of the *Barker* case.²⁹ In early English decisions,³⁰ and in Australian cases (including *Thomson v Orica*), a finding that the employer breached the duty not to destroy mutual trust has enabled the affected employee to accept the employer's conduct as a repudiation of the employment contract, and claim damages based on a failure to provide notice. In *Malik*,³¹ the House of Lords determined that as a matter of principle, damages could be awarded for breach of the implied term, independently of the damages awarded for wrongful termination, but before *Barker*, no Australian case had yet applied that principle. In *Barker*, the plaintiff employee was allowed to claim damages based on the loss of a chance to be redeployed, denied to him as a result of a breach of the obligation of mutual trust during the currency of his employment contract. This chance was assessed to be worth \$317 500 (which represented a 25 per cent chance of earning \$1 270 000 between his termination date and an expected retirement age of 65).³²

It is an important feature of the case that the Bank's failure to observe its own policy, and hence the conduct calculated to destroy trust and confidence, was held to have occurred while Mr Barker was still employed, and prior to the Bank's final decision to terminate his employment. Any argument that the Bank's decision to terminate his contract itself constituted breach of the implied term, or that the damages flowed from the decision to terminate and not from a prior breach of the employment contract, would have faced an obstacle known now as the '*Johnson* exclusion zone'.³³

This obstacle, identified by the House of Lords in *Johnson v Unisys Ltd*,³⁴ precludes an employee from claiming any common law damages based on breach of the mutual trust obligation if the claimed damage flows from the fact or manner of dismissal. This is because a majority of the House of Lords held that development of the common law of employment contracts ought not to be permitted to stray into territory claimed by the legislature. Mr Johnson had already received the maximum statutory compensation available for unfair dismissal when he brought a common law suit against his employer for additional damages

²⁹ *Barker* (2012) 229 IR 249, 303 [333]. Five judges of the New South Wales Court of Appeal have also left open the possibility that damages may be awarded for breach of an obligation not to destroy trust and confidence: see *Shaw v State of New South Wales* (2012) 219 IR 87 (Barrett JA; Beazley, McColl, Macfarlan JJA and McLellan CJ at CL agreeing). In that case, the Court rejected an application that a damages claim based on breach of the implied term must necessarily be struck out. The substantive question of whether damages would be awarded in that case has yet to be determined.

³⁰ See, eg, *Bliss v South East Thames Regional Health Authority* [1987] ICR 700.

³¹ [1998] AC 20. Note, however, that *Malik* was a test case argued on the basis of assumed facts, and ultimately the plaintiff employees in that case failed to prove their claim for damages: see *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258.

³² *Barker* (2012) 229 IR 249, 309 [370].

³³ See Weeks, above n 2, 181, and the discussion in Carolyn Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2011) 167–73.

³⁴ [2003] 1 AC 518 ('*Johnson*').

suffered as a consequence of mental distress following his dismissal. The majority held that the existence of a statutory scheme compensating employees for unfair dismissal precluded any further development of common law damages for breach of the mutual trust and confidence obligation if the claimed breach concerned the fact or manner of dismissal. This decision was affirmed in *Eastwood v Magnox Electric plc*,³⁵ and the general principle that the common law ought not to be developed in a manner that would be incoherent with a statutory regime has been followed in Australia in *New South Wales v Paige*.³⁶ This 'Johnson exclusion zone' provided no barrier to recovery for Mr Barker, because his claim depended on a breach of an obligation owed to him during his employment. Although his position had been made redundant, his employment contract remained on foot during the period in which he was eligible to be considered for redeployment. The decision to terminate his employment followed the Bank's failure to observe its own redeployment procedure, so both Besanko J and the majority on appeal held that the *Johnson* exclusion zone did not preclude recovery of damages.³⁷

III Appeal to the Full Court of the Federal Court – Majority Decision

In its appeal, the Commonwealth Bank contested the existence of the implied term of mutual trust and confidence, and whether such a term (should it exist at all) could be breached by failure to follow a non-contractual HR policy. The facts in *Barker* can be distinguished from those of *Thomson v Orica* on this point. In *Barker*, the policy was expressed not to form part of the contract, no doubt because the Bank, like many large and well-advised employers, was mindful of the risks apparent from cases such as *McCormick v Riverwood International (Australia) Pty Ltd*³⁸ and *Goldman Sachs JB Were Services Pty Ltd v Nikolich*³⁹ that a workplace policy may be found to comprise contractually binding promises that will benefit employees. The majority rejected the Bank's appeal, finding that Australian law should recognise the duty of mutual trust and confidence as a term implied by law into employment contracts, on the rationale of 'necessity' as it was articulated in the earlier decision of a Full Court of the Federal Court in *University of Western Australia v Gray*.⁴⁰ Their Honours held that the implied duty of trust and confidence is necessary, as a matter of policy, to 'prevent the enjoyment of rights conferred by [an employment] contract being rendered nugatory, worthless or seriously undermined',⁴¹ and is 'consistent with the contemporary view of the employment relationship as involving elements of common interest and

³⁵ [2005] 1 AC 503.

³⁶ (2002) 60 NSWLR 371.

³⁷ *Barker Appeal* (2013) 214 FCR 450, 456 [14]–[17].

³⁸ (1999) 167 ALR 689.

³⁹ (2007) 13 FCR 62. For commentary on this case, see Louise Keats, 'Workplace Policy as Contract: the Full Federal Court Hands Down its Decision in the *Nikolich Appeal*' (2008) 21 *Australian Journal of Labour Law* 43.

⁴⁰ (2009) 179 FCR 346, 377–9 [141]–[147].

⁴¹ *Barker Appeal* (2013) 214 FCR 450, 463 [92] (Jacobson and Lander JJ), citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 450; *Breen v Williams* (1996) 186 CLR 71, 103.

partnership, rather than of conflict and subordination'.⁴² They were careful to point out that 'partnership' should not be read in its strict legal sense, and that the duty must not be confused with a fiduciary duty. It was a contractual duty, the content of which needed to be 'moulded according to the nature of the relationship and the facts of the case'.⁴³

The majority also held that the Bank had breached this obligation, but on different reasoning from that of Besanko J. The majority disagreed that the Bank's redeployment policy could supply the content of the Bank's obligation under the implied term, because the policy itself was explicitly excluded from having contractual effect.⁴⁴ The specific procedures for providing employees with redeployment opportunities were held not to be contractual, either directly or indirectly, as a consequence of the employer's obligation not to destroy trust by seriously breaching its own policies. Nevertheless, the majority held that in all of the circumstances of this case — including his seniority and service for nearly 23 years with a large corporate employer with a 'huge workforce'⁴⁵ — the implied duty not to destroy trust and confidence required the Bank to take positive steps to consult with Mr Barker to 'inform him of suitable employment options' before terminating his employment for redundancy.⁴⁶

Under a fresh heading, 'An alternative approach: the implied duty of co-operation', the majority justified the recognition of the implied term on the basis of the well-accepted duty of co-operation in contract, which is founded on the principle that contracting parties are obliged to 'do all things necessary to enable the other party to have the benefit of the contract'.⁴⁷ Once treated as a rule of contract construction,⁴⁸ this principle has more recently been accepted by the Australian High Court as a 'term imported into all transactions of a particular description'.⁴⁹

The existence of a particular clause in Mr Barker's employment contract engaged this principle, or 'implied duty', of co-operation. Clause 8 included the following stipulation:

In the case where the position occupied by the Employee becomes redundant and the Bank is unable to place the Employee in an alternative position with the Bank or one of its related bodies, in keeping with the Employee's skills and experience, the compensation payment will be ...

⁴² *Barker Appeal* (2013) 214 FCR 450, 462 [81] (Jacobson and Lander JJ), quoting *South Australia v McDonald* (2009) 104 SASR 344, 390 [236].

⁴³ *Barker Appeal* (2013) 214 FCR 450, 465 [108] (Jacobson and Lander JJ), citing *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, 102.

⁴⁴ *Barker Appeal* (2013) 214 FCR 450, 466 [113]–[116].

⁴⁵ *Ibid* 467 [127].

⁴⁶ *Ibid* 466 [117].

⁴⁷ *Ibid* 467 [121].

⁴⁸ See *Mackay v Dick* (1881) 6 App Cas 251, 263 (Lord Blackburn).

⁴⁹ *Barker Appeal* (2013) 214 FCR 450, 466 [119] (Jacobson and Lander JJ), citing *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607 (Mason J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 448–9 (McHugh and Gummow JJ).

A method for determining a redundancy payout followed.⁵⁰ According to this ‘alternative approach’ to the problem, the implied term of trust and confidence supplied a particular interpretation of cl 8. This interpretation assumed that the words referring to the Bank’s ‘inability to place the Employee in an alternative position’ implied that the parties had ‘contemplated the possibility of redundancy and redeployment within the Bank, as an alternative to termination’.⁵¹ Given the Bank’s size and extensive network of operations, it was proper to construe this clause as conferring upon Mr Barker an entitlement to be consulted about redeployment opportunities, should his position become redundant.

Once the majority had accepted that Mr Barker’s employment contract included a term entitling him to be consulted on redeployment opportunities, they quickly resolved that the primary judge had approached the question of damages according to well-established principles permitting the recovery of damages for loss of a chance.⁵²

When the High Court comes to consider the relative merits of the various approaches to contract construction that favour Mr Barker’s side of the argument, this alternative approach in the majority reasons warrants acceptance. Justice Besanko’s view — that a serious breach of a non-contractual policy is sufficient of itself to constitute a breach of the employment contract because it is conduct calculated or likely to destroy trust and confidence — leaves little room for parties to an employment relationship to formulate deliberately mutable internal governance rules for themselves. While there is merit in the view that employers ought not to be able to exempt themselves from responsibility to observe their own policies, a question remains as to whether contract law is the appropriate regulatory tool to achieve that result. The essence of contract law is the enforcement of voluntarily assumed obligations only. Expectation-based damages are justified on the basis that the court is requiring no more than that a party honour its own deliberate promises. Other legal rules and remedies are needed if employers are to be compelled to comply with best practice.

If the majority’s reasoning is simply that a large employer such as the Commonwealth Bank must be held to an obligation to consult with senior employees about redeployment opportunities before dismissing them for redundancy, then it is contrary to other Australian authority holding that the implied duty of mutual trust and confidence does not constrain an employer’s right to decide to terminate an employment contract, so long as the employer observes the terms of the contract itself; for example, by providing a stipulated period of notice.⁵³ The alternative approach in the majority’s reasons, however, is more nuanced. According to this approach, the implied duty of trust and confidence operates to assist in the interpretation of ambiguous express provisions in the

⁵⁰ *Barker Appeal* (2013) 214 FCR 450, 472 [167].

⁵¹ *Ibid* 467 [127].

⁵² *Ibid* 468 [137]–[138] (Jacobson and Lander JJ), citing *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 103–4; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349.

⁵³ See, eg, *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 72 NSWLR 559; *Rogan-Gardiner v Woolworths Ltd (No 2)* [2010] WASC 290 (4 November 2010).

contract. Clause 8, which referred to the possibility of redeployment as an alternative to redundancy, could be interpreted in various ways. It may have meant nothing more than that the redundancy payout would not be available if the employee accepted redeployment. Or it may have meant that the parties would consider redeployment first, and if that was not possible, redundancy would follow. The choice of how this clause should be interpreted is influenced by the implied duty of mutual trust and confidence, which is essentially a duty upon each of the parties to cooperate in allowing the other to enjoy the benefit of the contract. In a case such as this, where the employer is a large national employer with diverse employment opportunities for thousands of people, it is reasonable to infer from a clause such as cl 8 that the parties intended Mr Barker to have the benefit of an opportunity for redeployment somewhere in the Bank's network before being dismissed for redundancy. The fact that an elaborate HR policy made provision for staff redeployment was part of the factual matrix making this interpretation the most reasonable one. Why maintain such a policy, if there is no practice of assessing redeployment prospects before dismissing staff whose positions have become redundant?

This does not mean that the HR policy manual has become a contract term by the back door. The policy manual described in detail the procedures unilaterally determined by the Bank for managing the process of staff redeployment. A failure to observe any particular procedure would not necessarily breach the employment contract. A failure, however, to permit Mr Barker any opportunity at all to access redeployment, because other Bank employees had neglectfully, or possibly vindictively, cut off his means of receiving relevant information, did constitute a serious breach of a duty to cooperate in allowing him the full benefit of a clause in his employment contract. This is the preferable approach, because it leaves the parties to determine their own contractual commitments, but it assumes that parties will cooperate in good faith to enable each to enjoy the intended benefits of their contract. It is a tool of contract construction that avoids the risk that one party (usually the stronger) will take opportunistic advantage of an ambiguity in contract documentation to deny the other party a benefit that both of them (on any fair and reasonable interpretation of their deal) fully intended to be available.

IV Justice Jessup's Dissent

Justice Jessup disagreed fundamentally with the proposition that Australian law does, or even should, recognise an implied duty not, without good cause, to act in a manner calculated or likely to destroy trust and confidence in the employment relationship. His reasons are comprehensive and will no doubt form the basis of the Bank's appeal to the High Court.

First, Jessup J attacked the legitimacy of the English authorities establishing the implied term. Notwithstanding that the term is well accepted in a body of English jurisprudence, Jessup J argued that in none of the foundational cases (including *Malik*) was it the ratio of the case. The whole jurisprudence was, he said, built on obiter. In many of the important cases forming the early pedigree of the term, the court accepted the existence of the term upon the agreement of the

parties, so its existence did not need to be decided.⁵⁴ In other cases conceding the existence of the term, the court did not find any breach on the facts.⁵⁵ And some of the cases cited as authority for the existence of the term were, in fact, based on more general and established principles of contract law.⁵⁶ This argument ought not to detain the Australian High Court for too long. English jurisprudence is relevant before the High Court only for its persuasive value, and judicial obiter is as relevant to persuasion as a ratio.

Justice Jessup's reasons also provided a comprehensive catalogue of Australian cases that have considered the implied term, and sometimes assumed its existence without deciding, but refused ultimately to apply it to provide a remedy.⁵⁷ The number of cases in which the implied term has been considered is testimony to the practical importance of the issue to be determined by the High Court. It has certainly featured in much employment contract litigation in recent years, but this is the first time the High Court has granted special leave in a case concerning the implied term.⁵⁸ If the High Court accepts the existence of the implied term, it will not be because English law must necessarily be followed, nor because the term has already become established in Australian jurisprudence developed by lower courts, but because the mutual trust obligation ought to be accepted — as a term implied by law as a matter of 'necessity' or as a principle of construction — in contemporary Australian employment contract law.

V 'Necessity'

Relying on the absence of any mention of the implied term in textbooks predating the enactment of the *Industrial Relations Act 1971* (UK), Jessup J argued that the term could not be justified by 'necessity'. He cited tomes on contract law more generally (including *Chitty on Contracts*, published in 1968), and specific treatises on employment contract law, published in the United Kingdom and also in Australia.⁵⁹ This argument assumes that if it was not necessary to imply an obligation not to destroy trust and confidence in the employment relationship prior to the enactment of employment protection legislation, then there can be no 'necessity' to imply such an obligation now, 40 years later. Employment relationships existed and operated without the term prior to its apparent invention in *Courtaulds Northern Textiles Ltd v Andrew*,⁶⁰ so they must be able to operate effectively without it now.

⁵⁴ *Barker Appeal* (2013) 214 FCR 450, 487 [218] (Jessup J), citing *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; 488–91 [221]–[226], citing *Malik* [1998] AC 20.

⁵⁵ *Barker Appeal* (2013) 214 FCR 450, 487 [217] (Jessup J), citing *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 and [1982] ICR 693.

⁵⁶ *Barker Appeal* (2013) 214 FCR 450, 487–8 [219]–[220] (Jessup J), citing *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 and *Scally v Southern Health and Social Services Board* [1992] 1 AC 294.

⁵⁷ *Barker Appeal* (2013) 214 FCR 450, 495–511 [236]–[282].

⁵⁸ A special leave application from *South Australia v McDonald* (2009) 104 SASR 344 was refused: [2010] HCATrans 25 (12 February 2010).

⁵⁹ *Barker Appeal* (2013) 214 FCR 450, 484 [211].

⁶⁰ [1979] IRLR 84.

With respect, this argument assumes that the common law is frozen in time, and cannot evolve to take account of developments in social attitudes and commercial practice. In *Blackadder v Ramsey Butchering Services Pty Ltd*,⁶¹ the High Court was prepared to recognise that in ‘modern times’, a principle from a 60-year-old case referring to the obligations between masters and servants may well be superseded given the contemporary expectations between parties to employment contracts.⁶²

This argument also appears to conflate the test of necessity applicable to implying terms in fact (the ‘business efficacy’ type of necessity), with the policy-based test of necessity engaged in considering terms implied at law. It is the ‘contemporary view’ — that long-term employment relationships engage expectations of mutual cooperation rather than subservience — that justified the majority in accepting the necessity of implying the mutual trust term,⁶³ not any practical imperative to give the contract business efficacy. In practical terms, it may be quite possible for an employment contract to subsist without many of the terms we have come to expect as ‘implied’ at law, such as the implied term that the employer will become the owner of any valuable property created by an employee during the course of performing the duties of her employment. Such a term is not so ‘necessary’ as a matter of business efficacy that the employer ought to be relieved of the trouble of expressly including such a term in an employment contract. Neither is it so ‘obvious that it goes without saying’, if the cases contesting the application of this implied term are any indication of obviousness.⁶⁴ It is, however, a term that derives from an assumption that the master/employer who has funded the enterprise and paid for the work should also be entitled to claim any abiding fruit from the labour, in the form of property. This is a policy position. This term is implied because our property-respecting legal system considers it good policy to imply such a term to protect the investments of employers, even without express stipulation by the parties.

VI Contemporary Employment Relationships

If mutual trust and confidence is to be assessed for its legitimacy as a term implied at law in Australia, it must be assessed according to its necessity given contemporary Australian policy positions regarding the appropriate relationship between employing enterprises and their employees. Justice Jessup indicated that he was unconvinced by Lord Steyn’s view (expressed in *Malik*)⁶⁵ that employment law has developed so that the old notion of a ‘master and servant’ relationship is obsolete.⁶⁶ This author takes a different view.

⁶¹ (2005) 221 CLR 539.

⁶² Ibid 566 [80]. The court rejected the view that *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647 should be relied upon to reject the proposition that an employee may owe an employer a duty to provide meaningful work. In this case, Asquith J said: ‘Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out’ (at 650).

⁶³ *Barker Appeal* (2013) 214 FCR 450, 464 [95].

⁶⁴ See, eg, *Spencer Industries Pty Ltd v Collins* (2003) 58 IPR 425; *University of Western Australia v Gray* (2009) 179 FCR 346.

⁶⁵ [1998] AC 20, 45–6.

⁶⁶ *Barker Appeal* (2013) 214 FCR 450, 491 [227].

In cases such as *Barker*, the employer (like many contemporary employers) was not an individual master, but a large corporation. A corporate employer, while technically a single legal 'person', is in economic reality a collective of the interests, energies and investments of many different persons (shareholders, managers, employees) engaged in co-operative endeavour. In reality, the employing enterprise's decisions affecting the interests of employees will generally be taken by other employees. The interests of the corporation and its investors are best served when no individual manager has the power capriciously to exclude other employees from the intended benefits of the enterprise's terms of employment. Today, the management teams of corporate employers commonly create elaborate policy manuals (such as the manual in question in *Barker*) to govern the internal relationships between staff. The master's prerogative to command and the servant's implied duty to obey are rarely deemed sufficient to regulate the more complex interpersonal relationships involved in large corporate enterprises.

These policy manuals do need to be mutable. They need to be modifiable to respond to various challenges faced by the enterprise. So it is understandable that the Bank in this case (and similar employers in other cases about the legal status of policy manuals)⁶⁷ should seek to avoid any strict contractual liability for the commitments made in policy documents. It would be deeply inconvenient if employment contracts had to be renegotiated with every individual employee every time an employing enterprise discovered a need to adjust its internal governance protocols. Nevertheless, it is reasonable to assume that the 'partners'⁶⁸ in these cooperative enterprises do expect that current policies will be applied honestly and reasonably, especially if (as was the case here) the employment contract alludes to the substance of a policy commitment. Mr Barker's contract did refer (in cl 8) to the possibility of redeployment. The question for the High Court is, should this contract clause be interpreted in the light of an overarching obligation to cooperate or consult with Mr Barker, in determining his eligibility for deployment? Was a negligent (or possibly deliberate and mean-spirited) failure to do so a breach of a legally recognised obligation not to destroy the trust and confidence in the employment relationship?

VII Coherence with Statutory Developments

Another of Jessup J's serious objections to the implication of the mutual trust and confidence term was that it might 'intersect with legislated norms of conduct'.⁶⁹ He was critical of the 'unwisdom'⁷⁰ of the British courts in developing a principle that was soon found (in *Johnson*⁷¹ and the cases following it⁷²) to be unable to 'co-

⁶⁷ See, eg, *Goldman Sachs JB Were Services Pty Ltd v Nikolich* (2007) 163 FCR 62; *Riverwood International (Australia) Pty Ltd v McCormick* (2000) 177 ALR 193.

⁶⁸ Using 'partners' in the general, non-technical sense adopted by the majority in the *Barker Appeal* (2013) 214 FCR 450, 462 [82].

⁶⁹ *Barker Appeal* (2013) 214 FCR 450, 527 [332].

⁷⁰ *Ibid.*

⁷¹ [2003] 1 AC 518.

exist with the detailed regime for the treatment of dismissals that had become the subject of legislation'.⁷³ As noted above, the United Kingdom jurisprudence has accommodated the problem of potential incoherence with statutory law by marking out a '*Johnson* exclusion zone', so that the implied duty of trust and confidence will not be engaged to enable a plaintiff to overreach the maximum damages award permitted under statute for an unfair dismissal.

This appeal provides the High Court with an opportunity to determine whether this principle of contract construction applies in Australian circumstances, where statutory unfair dismissal laws are framed quite differently from those in the United Kingdom. There are many more exclusions from the Australian unfair dismissal protections in the *Fair Work Act 2009* (Cth).⁷⁴ Indeed, a managerial employee in Mr Barker's position would not be eligible to apply for an unfair dismissal remedy under the *Fair Work Act*, because he was not employed under a modern award or enterprise agreement, and his income exceeded the threshold set for non-award employees.⁷⁵

Unlike the court process provided by United Kingdom legislation, Australian statutory remedies for unfair dismissal have always been a matter for determination by an administrative tribunal. The Fair Work Commission and its predecessors⁷⁶ are not courts, and commissioners do not make judicial decisions or determine legal rights. While the rights and responsibilities under an employment contract may be relevant in determining whether a dismissal was 'harsh, unjust or unreasonable',⁷⁷ an applicant does not need to demonstrate that the employer has breached the employment contract in order to seek a remedy, and indeed, an employee who has technically breached the employment contract may be entitled to a remedy if the Commissioner arbitrating the matter determines that dismissal was too harsh a penalty for the employee's misconduct. The principal remedy for a successful applicant is reinstatement (which is a remedy generally unavailable to employees at common law), and compensation is only awarded when a dismissal has been determined to be unfair, but reinstatement is deemed to be impractical or inappropriate in the circumstances.⁷⁸

The underpinning policy of Australian unfair dismissal legislation is to promote job security across the labour market. It is a law concerned with the broad public interest in providing a measure of job security for ordinary workers, notwithstanding that their employment contracts do not guarantee them that security. Hence it excludes many managerial employees. On this view of the legislation, the Australian statutory unfair dismissal regime does not manifest any intention to interfere with the separate development of the common law of individual employment contracts, and there would be no injury to the integrity of

⁷² Including *Eastwood v Magnox Electric plc* [2005] 1 AC 503 and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22.

⁷³ *Barker Appeal* (2013) 214 FCR 450, 527 [332].

⁷⁴ See *Fair Work Act 2009* (Cth) pt 3-2, especially ss 382-93 ('*Fair Work Act*').

⁷⁵ *Fair Work Act* s 382(b).

⁷⁶ Most recently, the Australian Industrial Relations Commission.

⁷⁷ *Fair Work Act* s 385(b).

⁷⁸ *Ibid* s 390(3).

the statutory scheme from judicial development of the common law of employment.

The view that common law and statutory rights and responsibilities may coexist without necessarily intermingling is supported by the High Court decision in *Byrne v Australian Airlines Ltd*,⁷⁹ which held that a binding industrial award did not necessarily become part of an employee's common law contract of employment. The two systems of law — common law contract, and industrial arbitration leading to compulsory awards — were based on different principles, and operated independently. Contract law is predicated on the assumption that there is no injustice in holding parties to honour their own voluntarily made promises, by paying expectation-based damages should they renege. The industrial arbitration system was based on the entirely different principle that employers in an industry should be compelled (regardless of any agreement of their own) to respect the minimum conditions of employment determined by an industrial tribunal acting in the public interest to resolve an industrial dispute. The remedies flowing from breach of an award are those stipulated in the statutory scheme creating that compulsion.

If this view is applied also to the unfair dismissal provisions, there is no reason that the statutory protections should interfere with a principled development of the common law of employment, so long as that development is not clearly incompatible with a statutory provision. One provision that may preclude development of a common law right to seek damages for hurt and humiliation is the *Fair Work Act* s 392(4), which prohibits the Fair Work Commission from awarding any compensation in respect of hurt or humiliation in an unfair dismissal matter.⁸⁰ This provision sterilises the impact of *Burazin v Blacktown City Guardian Pty Ltd*,⁸¹ in which the Industrial Relations Court of Australia (whose jurisdiction was subsequently transferred to the Federal Court) awarded a measure of damages for distress to an employee who had been marched off the employer's premises in the most humiliating manner. The Court emphasised that this head of damage was awarded as an element of statutory compensation that would not be available under common law for so long as *Addis v Gramophone Co Ltd*⁸² remained good law.

It would be difficult, in the light of this statutory provision, for the High Court now to overturn this principle. So, even if the High Court were to find that Australian employment law recognised the implied term of trust and confidence, it is difficult to see that it could operate in any way that would permit damages to be awarded merely for hurt and humiliation or other distress caused as a consequence of breach of the employment contract. In *Barker*, this was not the issue. Mr Barker's successful damages claim was based on the loss of an opportunity to earn

⁷⁹ (1995) 185 CLR 410.

⁸⁰ Since the introduction of the *Work Choices* amendments to unfair dismissal provisions in 2006, the statutory scheme has specifically prohibited awarding any compensation in respect of 'hurt and humiliation'. See the *Workplace Relations Act 1996* (Cth) s 654(9), which was in force from 27 March 2006 until the enactment of the *Fair Work Act* s 392(4).

⁸¹ (1996) 142 ALR 144.

⁸² [1909] AC 488.

future remuneration from the chance of redeployment, and this loss was held to have arisen during the term of his employment contract.

Justice Jessup was not only concerned with potential incoherence with statutory unfair dismissal laws. He also said that any general implied term of trust and confidence may also ‘overlap’ with standards of employer conduct legislated by occupational health and safety laws⁸³ and various anti-discrimination statutes,⁸⁴ in particular, the prohibitions on harassment in the *Sex Discrimination Act 1984* (Cth).⁸⁵ Of course, Mr Barker’s case did not involve any findings of sexual harassment. Justice Jessup’s concern appears to be that a general obligation not to act in a manner calculated to destroy trust and confidence would be too indeterminate, and would risk interfering or overlapping with a range of statutes which have, in recent times, been enacted to regulate workplace conduct. This argument is the common one, eschewing judicial intervention in fields better addressed by a democratically elected Parliament:⁸⁶

There is . . . a real question whether the courts should take it upon themselves, by the development of the common law, to engage in law reform for a better social order . . .

My concern . . . is that the court is being asked to endorse a norm of conduct that would apply to all employment relationships in Australia, yet we do not have the advantage, which the legislature enjoys, of being able to consider practical implications of the change across all areas and the points of intersection between that norm and existing statutory obligations.⁸⁷

This concern may be justified where a court exercising common law jurisdiction is being asked to depart ‘from a settled rule of the common law’.⁸⁸ In this case, the common law principle claimed on behalf of Mr Barker is neither a radical departure from established common law principles, nor is it incongruent with contemporary statutory developments. On the majority’s alternative approach, the principle is consistent with a well-established duty to cooperate in the common law of contract. It is also consistent with the tenor of much contemporary statutory development, including the statutes mentioned by Jessup J, all of which concern themselves with the more careful protection of the rights, and the personal dignity and integrity of employees.⁸⁹

If the High Court heeds this particular concern of Jessup J, then it surely is time for an Australian employment law statute to recognise a duty of good faith performance in employment contracts, as do the laws of our neighbours across the Tasman. The New Zealand Parliament has legislated a norm of ‘good faith’ in employment. The *Employment Relations Act 2000* (NZ) includes among its objects:

⁸³ *Barker Appeal* (2013) 214 FCR 450, 529 [335].

⁸⁴ *Ibid* 530 [338].

⁸⁵ *Ibid* 529–30 [336]–[337].

⁸⁶ *Ibid* 531 [340(g)]. See also the observations of Mason J in *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633–4.

⁸⁷ *Barker Appeal* (2013) 214 FCR 450, 524 [324]–[325].

⁸⁸ *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 634 (Mason J).

⁸⁹ See Paul Finn, ‘Statutes and Common Law’ (1992) 22 *University of Western Australia Law Review* 7, 16, for a view that both the common law and statutory developments in Australia now recognise ‘a duty of good faith and fair dealing in contract performance’.

to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship —

- (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour.⁹⁰

If the development of Australian employment contract law is to be crippled by judicial reluctance to recognise a good faith obligation, then the Australian Fair Work legislation needs to be amended to include recognition of this norm.

VIII Status of Workplace Policies

Justice Jessup concluded that, even if the implied term of trust and confidence existed, it could not have been breached in this case by the Bank's failure to follow its own redeployment procedures. This is because the Bank had clearly stipulated that the policy manual was to have no contractual effect. Although the Bank and all its employees no doubt expected that the Bank would adhere to these policies, that expectation could not arise as a matter of contract. The expectation justified by the existence of the policy 'could not have risen higher than its source'.⁹¹ 'Put another way, the policies stood outside the bundle of rights and obligations that existed as a matter of contract between employer and employee.'⁹²

This raises an interesting question about the role of HR policy manuals in employment. They often provide the most extensive articulation, not only of the internal governance practices of an incorporated business enterprise, but also of many of the important terms and conditions of long-term employment. For example, in *Cuttriss v Carter Holt Harvey Ltd*,⁹³ a case decided by the New Zealand Employment Court in Auckland, the policy in dispute determined entitlements to retirement benefits for long-serving employees. The plaintiff in that case was contesting a sudden change in policy that withdrew his entitlement to about NZ \$54 000 overnight.

Policy documents can contain important terms and conditions of the employment bargain. If Jessup J's argument is correct, it would be open to an employer to move many important terms and conditions of employment (including salary and other financial entitlements) into policy documents, and disclaim any legal obligation to honour those commitments. Notice periods could readily be moved into non-contractually binding HR policy manuals. The employee's 'bundle of rights and obligations' could readily be reduced to a bundle of obligations, bereft of any rights at all. The employment relationship would hardly be contractual, but rather an 'at will' relationship subject only to any legal regulation imposed by statute. If the High Court finds that employers are not constrained by any obligation of mutual trust and can capriciously ignore their own policy

⁹⁰ *Employment Relations Act 2000* (NZ) s 3(a)(i).

⁹¹ *Barker Appeal* (2013) 214 FCR 450, 533 [348].

⁹² *Ibid.*

⁹³ [2007] ERNZ 233 (Travis J).

commitments without legal consequences, then employment regulation in Australia will no longer be underpinned by contract law. Employment will become an ‘at will’ relationship, partially regulated by a patchwork of statutes.

IX Conclusion

It will be a great benefit to employment law practitioners to have clarification from the High Court about what role, if any, the implied obligation of mutual trust and confidence should play in Australian employment law jurisprudence. Although Australian courts have rarely decided a case on the basis of a breach of the obligation, judicial statements in a number of decisions have encouraged many employee plaintiffs to include claims based on an alleged breach of this obligation in their statements of claim.⁹⁴ Allegations of breach of ‘mutual trust and confidence’ have indeed become ‘the “abracadabra” of the plaintiff lawyer, sprinkled liberally over statements of claim, in the hope of summoning up some exceptional damages award from a mundane termination of employment claim’.⁹⁵ Clarity about the nature and application of such an obligation, and whether its breach can sound in an award of damages, is essential.

This author hopes very much that the High Court will take this opportunity to revisit whether mutual trust and confidence (and indeed ‘good faith’ more generally) is properly understood as a term implied by law into certain types of contract, or whether it is better understood as a general principle of contract construction. The construction argument posits that the duty to cooperate, and the duty to perform contracts ‘in good faith’, operate to oblige parties to perform their obligations under a contract in a manner that permits the other party to enjoy the intended benefits of the contract. Writing extrajudicially, the Chief Justice of the Federal Court of Australia has said that it is ‘not a large step to recognise the notion [of good faith] as an informing principle, expectation or maxim of the common law’.⁹⁶ If good faith is the commercial cousin of employment law’s ‘mutual trust and confidence’, then it should not be too great a step to recognise the existence of this norm in employment law. If it has any operation at all, it is surely to inform the way that parties’ contracts are to be construed and interpreted. The majority in the *Barker Appeal* used the implied term in this way, when construing cl 8 of Mr Barker’s employment contract. The construction argument also answers Jessup J’s concern with the indeterminacy of an independent implied term. It is to be hoped that the High Court will provide some illumination not only of whether this obligation exists, but of its juridical nature.

⁹⁴ See especially *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198 (Rothman J); *Morton v Transport Appeal Board* (2007) 168 IR 403 (Berman AJ); *McDonald v South Australia* (2008) 172 IR 256; *Rogers v Millenium Inorganic Chemicals Ltd* (2009) 178 IR 297 (Lucev FM); *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633 (Rothman J); *Foggo v O’Sullivan Partners (Advisory) Pty Limited* (2011) 206 IR 87, 115 [99] (Schmidt J); *Rogan-Gardiner v Woolworths Ltd (No 2)* [2010] WASC 290 (4 November 2010).

⁹⁵ Riley, ‘The Boundaries’ above n 2, 73.

⁹⁶ James Allsop, ‘Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle’ (2011) 85 *Australian Law Journal* 341, 357.